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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.200 OF 2007

Filomina Khotwal & another Appellants
versus
Navin Dharshi Shah & others Respondents

Mr.Havnur i/by Smt.Trupti R. Rangnekar for appellants.

Mr.P.S.Madkaikar for respondents 1 and 2.

Mr.Nitin V. Gangal for respondent no.3.

CORAM : A.S.OKA, J.

DATE : 02nd April 2007

PC :

1. Heard learned advocate for the appellant, advocate for first and second respondents and advocate for the third respondent. Advocates appearing for the respondents waive service. Considering the facts and circumstances of the case, taken up for hearing forthwith.

2. The appellants are the original plaintiffs. A suit was filed for perpetual injunction by the appellants. The suit was dismissed for default on 21st January 2006. On 27th February 2006, a

Notice of Motion was taken out by the appellants for setting aside the order dismissing the suit and for restoration of the suit. By the impugned order dated 20th April 2006, the learned Trial Judge has rejected the Notice of Motion.

3. The learned advocate for the appellants invited my attention to the facts of the case. He pointed out that though there is a delay in filing the Notice of Motion, there was sufficient explanation in the affidavit filed by the appellants for the said delay. He invited my attention to paragraph no.5 of the affidavit-in-support filed by the first appellant. The learned advocate appearing for the respondents pointed out that all along the first appellant has been negligent in prosecuting the suit. He submitted that as there was no explanation whatsoever for the delay, the learned Trial Judge was justified in rejecting the Notice of Motion.

4. I have carefully considered the submissions. In the affidavit-in-support, the first appellant has disclosed that she is a widow and the second appellant is her minor daughter. In paragraph no.3 of the affidavit-in-support, the first

appellant has described as to what transpired on 21st January 2006. She has stated that she could not file the affidavit of evidence due to oversight and it was a bona fide mistake.

5. Considering the fact that the first appellant is a widow and considering the fact that her suit has been dismissed for default, one opportunity deserves to be granted to the appellants to prosecute the suit. Some prejudice will be caused to the respondents if the suit is restored. However, the respondents can be compensated by ordering payment of substantial costs. Considering the facts and circumstances of the case, the appellants will have to pay costs of Rs.5,000/- (Rs.Five thousand only) in two sets. The first one will be payable jointly to first and second respondents and the second one will be payable to third respondent. Considering the fact that the first appellant is a widow, sufficiently long time is granted to her to pay costs.

6. Hence, the appeal is disposed of by following order :-

(a) The impugned judgement and order dated 20th

April 2006 is quashed and set aside;

(b) Notice of Motion No.1721 of 2006 is made absolute in terms of prayer clauses (a) and (b) thereof subject to condition of appellants paying or depositing with the Trial Court costs of Rs.5,000/- in two sets as indicated in this judgement on or before 25th May 2007.

(c) Deposit of the amount of costs in the Trial Court within the stipulated period will be considered as a substantial compliance of this order. If compliance is not made with the order of costs, the impugned order will stand;

(d) If compliance is made, parties will appear before the Trial Court on 6th June 2007 at 11.00 a.m.. On that day the first appellant will file her affidavit of examination-in-chief. It is made clear that no further time will be granted by the Trial Court to the first appellant to file the affidavit of examination-in-chief under any circumstances;

(e) Hearing of the suit is expedited and the same shall be disposed of by the Trial Court preferably on or before 31st December 2007;

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(f) All contentions of both the parties in the pending suit are expressly kept open;

(g) Appeal is partly allowed in the above terms. Writ to be sent immediately;

7. In view of disposal of Appeal from Order, Civil Application No.297 of 2007 does not survive and stands dismissed as such.

(A.S.OKA, J.)